BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALFREDO SANCHEZ-CERVANTES Claimant	)	
V.	)	
KANSAS EROSION PRODUCTS, LLC Respondent	)	Docket No. 1,077,396
AND	)	
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 30, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Jeffrey E. King of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ denied claimant's preliminary hearing requests after determining claimant willfully failed to use a reasonable and proper guard and protection furnished by respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 22, 2016, Preliminary Hearing and the exhibits; the transcript of the June 27, 2016, evidentiary deposition of Brent Spellman and the exhibits; and the transcript of the June 27, 2016, evidentiary deposition of Steve Ade, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues he was merely negligent due to lack of training and did not willfully fail to use the guard. Claimant states he used the guard improperly.

Respondent maintains the ALJ's Order should be affirmed.

The issue for the Board's review is: did claimant's injury result from his willful failure to use a reasonable and proper guard voluntarily furnished by respondent?

FINDINGS OF FACT

Respondent manufactures straw-filled erosion control mats and "wattles," which are long tubes filled with straw, commonly seen along highway ditches. The straw is sewn into plastic netting by machines in respondent's plant. The erosion mat machine, referred to as the "blue" machine, consists of two motorized rubber-coated rollers which pull the mat and the straw through 96 sewing needles. The blue machine has a steel mesh access gate, or guard, to prevent objects from entering the machine while in use. The guard is to remain closed at all times while the machine is running; the operator can observe the machine through the steel mesh. The guard is hinged, allowing the operator to swing it out of the way when accessing the machine.

Claimant testified one or more of the sewing needles would lose its thread each hour, and his job was to re-thread the needles. The machine must be shut off and the access guard opened to re-thread the machine, and it required two people.

Claimant was initially hired in August 2015. Plant manager Brent Spellman testified claimant underwent safety training related to the machinery at that time, which included topics such as avoidance of pinch points and respect of safety guards. Claimant signed a safety training log on August 6, 2015, indicating he received the training.[1] Part of the training included information directed specifically towards "caught or crush" injuries. Claimant signed the page containing the instructions relating to "caught or crush" injuries. The instructions included: (1) never reaching into an open machine and (2) turning the equipment off before adjusting or clearing a jam.

Claimant left respondent for a time before he was rehired in late February or early March 2016. Mr. Spellman conducted a tour of the plant on March 4, 2016, as part of a training session. He explained his training begins with verbal and written instruction in the break room before taking a tour of the machines to discuss danger points specific to each machine. Mr. Spellman indicated this tour included identifying the pinch points of the blue machine. Claimant acknowledged receipt of this training with his signature on March 4, 2016.[2]

Respondent assigned claimant to work the blue machine upon his rehire. Claimant testified he received no training on how to operate the blue machine:

---

[1] See Spellman Depo., Ex. 1 at 1.

[2] See *id*. at 6-9.

> Q. And you ran the blue machine the previous year?
>
> A. Yes.
>
> Q. When you came back did you get any new training or explanations on how to run the machine?
>
> A. Not at all, no.
>
> Q. Okay. Did you check with any of your co-workers on how to run the machine?
>
> A. I do remember asking the general manager. I had forgot how to run the machine, he just told me to ask around.[3]

Claimant worked the night shift. On April 13, 2016, the evening prior to his injury, claimant was operating the blue machine without the guard in place. Claimant testified he could not see whether the machine was working correctly due to his height and therefore opened the guard. Claimant stated he did not remove the guard entirely from the machine because he was told not to do so when he asked Mr. Spellman. Mr. Spellman disputed claimant's testimony, stating claimant had completely removed the guard from the machine. Mr. Spellman testified:

> It was, when I walked up there [the guard] was completely removed. [Claimant] took the bolts, there's two hinge bolts over here, (indicating), he took both of them bolts out, removed the [guard] and was standing there on a platform where he stands.
> . . .
>
> We stopped the machine immediately and reinstalled it. And we talked about why that [guard] is important to be there.[4]

Both Steve Ade, respondent's co-owner, and Mr. Spellman explained the machine sits at table or "belt buckle" height.[5] They indicated that although claimant is not very tall, he could easily see into the machine with the guard closed. Mr. Ade and Mr. Spellman each testified employees are instructed that under no circumstances is the guard to be removed or opened while the machine is running. Mr. Spellman, who ordinarily works the day shift, prepared a written warning regarding claimant's removal of the guard on the morning of April 14, 2016. Claimant did not receive the warning prior to beginning his shift that evening.

---

[3] P.H. Trans. at 16.

[4] Spellman Depo. at 13-14.

[5] Ade Depo. at 14.

On April 14, 2016, claimant was injured when his left hand became caught in the rollers of the blue machine. Claimant initially testified he opened the guard to look into the machine, but did not plan to place his left hand inside. He said:

> I didn't mean to, because I put my hand on the side, because there's like, I'm going to say six inches of free space to lean forward. I had to support my hand to lean forward, but I couldn't be able to see, that's where my hand got caught.[6]

However, claimant gave a statement to the insurance adjustor following the incident:

> Q. All right. According to the – what you told the adjustor at the time is you started looking in the machine, and I started putting my hand on top of the net to make sure it was sewing. Is that what you told her?
>
> A. I believe so, yes.
>
> Q. Okay. So you actually reached down to feel the net to make sure it was sewing; correct?
>
> A. Yes, because it overlaps, so when it overlaps to sew where it won't fall out . . . and I just lifted it up to make sure it was sewing, and it was sewing. So when I took my hand out, that's when the accident happened.[7]

Claimant initially received treatment at the hospital for his left hand injury. He is currently under temporary restrictions of office work only. Claimant testified respondent would not accommodate his restrictions. Mr. Spellman explained claimant could not operate the machine while taking any medication or while having an open wound. However, Mr. Spellman indicated claimant could oversee the blue machine with one hand. He said, "[Claimant] definitely would be worth just having there to oversee, stop the machine, whatever the case of it is, very easily one handed."[8]

PRINCIPLES OF LAW

K.S.A. 2015 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

---

[6] P.H. Trans. at 29-30.

[7] *Id*. at 30.

[8] Spellman Depo. at 23.

K.S.A. 2015 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2015 Supp. 44-501(a)(1) states, in part:

> Compensation for an injury shall be disallowed if such injury to the employee results from:
> (A) The employee's deliberate intention to cause such injury;
> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or . . .

K.S.A. 2015 Supp. 44-501(a)(2) states:

> Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

The Kansas Court of Appeals, in *Carter v. Koch Engineering,* stated that a violation of instructions alone is not enough to render an employee's actions "willful" as a matter of law. The Court held:

> For a violation of instructions to be "willful" under K.S.A. 44-501(d), it must include "the element of intractableness, the headstrong disposition to act by the rule of contradiction." *Bersch v. Morris & Co.,* 106 Kan. 800, 804, 189 Pac. 934 (1920).[9]

K.S.A. 2015 Supp. 21-5202(j) states:

> A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

---

[9] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, Syl. ¶ 6, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

In his Order, the ALJ wrote:

> The court views Claimant's conduct in defeating the protections of the guard, less than 24 hours after having been counseled about the importance of observing the guard's protections and leaving the guard in place as evidence of intractableness, a headstrong disposition to ignore instruction, safety training and counseling to operate the machine in an unsafe and dangerous manner, and it was that intractableness that led to Claimant's injuries.[12]

The undersigned agrees. Claimant admitted he attended the safety class related to preventing "caught and crush" injuries.[13] Claimant admitted signing the page contained in the training materials that specifically instructed trainees to "never reach into a moving machine."[14] Claimant admitted to being told by Mr. Spellman, the night before the injury giving rise to this claim, he was not to remove the guard.[15] Despite the training and counseling provided by his supervisor, claimant removed the guard and reached into the moving machine.

Claimant consciously disregarded a substantial and unjustifiable risk. His disregard of his training and oral warnings constituted a gross deviation from the standard of care which a reasonable person would exercise in the situation.

---

[10] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2015 Supp. 44-555c(j).

[12] ALJ Order at 2-3.

[13] P.H. Trans. at 24.

[14] See *id.* at 26; Resp. Ex. A at 6.

[15] See *id*. at 28.

CONCLUSION

Claimant's injury resulted from his willful failure to use a reasonable and proper guard voluntarily furnished by respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated June 30, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2016.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
jjseiwert@sbcglobal.net
nzager@sbcglobal.net

Jeffrey E. King, Attorney for Respondent and its Insurance Carrier
jeking@hamptonlaw.com
wcgroup@hamptonlaw.com

Hon. Bruce E. Moore, Administrative Law Judge